IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 22, 2000 Session

STATE OF TENNESSEE v. CHRISTOPHER ALLEN McBRYAR

Direct Appeal from the Criminal Court for Hamilton County
No. 224530 Douglas A. Meyer, Judge

No. E2000-00417-CCA-R3-CD
March 2, 2001

A Hamilton County jury convicted the Defendant of violating the Sexual Offender Registration and Monitoring Act. The trial court subsequently sentenced him to 180 days incarceration. In this appeal as of right, the Defendant argues (1) that the evidence presented at trial is insufficient to support his conviction; (2) that the trial court improperly instructed the jury; (3) that the trial court erred by concluding that his sentence could not be suspended; and (4) that Tennessee Code Annotated § 40-39-108(b) violates his right to confrontation. Finding no error, we affirm the Defendant's conviction and sentence.

Tenn. R. Crim. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and DAVID H. WELLES, JJ. joined.

Larry G. Roddy, Sale Creek, Tennessee, for the appellant, Christopher Allen McBryar.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William H. Cox, III, District Attorney General; Dana Lesley-Draper, Assistant District Attorney General; and Dean C. Ferraro, Assistant District Attorney General; for the appellee, State of Tennessee.

OPINION

On September 14, 1999, a Hamilton County jury found the Defendant, Christopher Allen McBryar, guilty of violating the Sexual Offender Registration and Monitoring Act. On October 8, 1999, the trial court sentenced him to 180 days incarceration and fined him $500. The Defendant now appeals his conviction and sentence, raising the following issues for our review: (1) whether the State presented sufficient evidence to support his conviction; (2) whether the trial court erred by failing to instruct the jury that to convict the Defendant, it must find that the requirements and sanctions of the Sexual Offender Registration and Monitoring Act had been explained to him and

that he understood them; (3) whether the trial court erred by concluding that his sentence could not be suspended; and (4) whether Tennessee Code Annotated § 40-39-108(b) violates the Defendant's confrontation rights. We affirm the judgment of the trial court.

The Defendant was convicted of rape in 1988 and sentenced to eight years incarceration. He was incarcerated at the Southeast Regional Correctional Facility. Mark Fann, a counselor at the Southeast Regional Correctional Facility, testified that he met with the Defendant prior to his release from incarceration and explained to him the terms of the Sexual Offender Registry Program. He recalled that the program was initiated shortly before the Defendant's release and that the Defendant was one of the first offenders in the program. Fann stated that he explained the following steps to the Defendant: Approximately thirty days prior to his or her release, a sex offender is required to fill out a sex offender release notification form. After release, the sex offender receives a form from the Tennessee Bureau of Investigation (TBI) every ninety days, which the offender must fill out and return within ten days. An offender must complete the forms every three months for ten years, after which time the offender may request to be removed from the registry. Fann testified that he tells each offender that failure to complete and return a form once could result in a misdemeanor conviction and that failure to complete and return a form two or more times could result in a Class E felony conviction. Fann testified that he also informed the Defendant that if he moved, he was required to notify the TBI of his change of address within ten days of the move. Following their conversation, the Defendant signed the first notification form, on which he indicated that after his release, he planned to live at 3372 Adkins Lane in Chattanooga.

On cross-examination, Fann admitted that he did not provide the Defendant with a written copy of the sex offender registry instructions, although a copy of the instructions labeled "offender's copy" was provided for Fann at the time of his meeting with the Defendant. He explained, however, that his meeting with the Defendant took place shortly before the Sexual Offender Registration and Monitoring Act took effect and therefore that he was not required to provide the Defendant with written instructions at that time. Nevertheless, Fann stated that he read the instructions to the Defendant, and he maintained that the Defendant appeared to understand the instructions. Fann further testified that he explained to the Defendant when the statute governing the Sexual Offender Registry Program was to go into effect.

The State entered into evidence an affidavit in support of probable cause from Kathryn Brewington of the TBI. In the affidavit, Brewington indicated that the Defendant had "failed to timely disclose information or deliver the required information to the TBI." Attached to the affidavit were several verification forms which had been mailed to the Defendant at 3372 Adkins Road in Chattanooga. The first form was returned to the TBI five days late, the second form was returned stamped "Attempted Not Known," and eight subsequent forms were returned to the TBI marked "Unclaimed."

Detective Steve Runyan of the Hamilton County Sheriff's Department testified that he was working as a fugitive detective in 1998. He stated that on December 17, 1998, the Defendant surrendered himself to the fugitive office after learning of a warrant against him for violation of the

Sexual Offender Registration and Monitoring Act. Runyan testified that he booked the Defendant when he presented himself at the fugitive office and stated that the Defendant reported that he lived at 3372 Adkins Road in Chattanooga.

The Defendant testified on his own behalf at trial. He stated that he was convicted of rape and burglary in 1988 and that he served over five years for the crimes. He maintained that prior to his release from incarceration, no one discussed the registry requirements with him, and he insisted that he did not know the penalties for failure to report. He claimed that he did not recall signing any document indicating that he had been informed of the Sexual Offender Registration and Monitoring Act, stating, " I had to sign a lot of papers."

However, the Defendant admitted that from approximately January 1995 until April 1996, he had returned each form sent to him by the TBI. The Defendant testified that he stopped returning the forms when he began to work out of town periodically on construction jobs. He explained that when the forms arrived at his mother's home on Adkins Road, where he lived, and he was not there to claim them, the post office would return them to the TBI.

On cross-examination, the Defendant admitted that the form he signed prior to his release from incarceration contained the following language:

> The Sexual Offender Registry Program and sanctions for failing to comply with the requirements of the program have been explained to me. I have been provided a blank TBI sexual offender registration form and understand that I must submit it to TBI headquarters in Nashville within 10 days of my release to probation, parole, or other alternative to incarceration, or within 10 days of discharge from incarceration without supervision.
>
> I also understand that if **any** information changes on my registration form even temporarily, for any reason longer than 10 days, I must notify the TBI's Sexual Offender Registry at the address below or be subject to penalties of the law.

(Emphasis in original.)

The Defendant admitted that he had failed to send in forms from approximately April 1996 until June 1998. He also acknowledged that despite his failure to comply with the registry requirements, he was never away from his mother's home for more than ten consecutive days during this period. He admitted that at least one of the forms which he had failed to return had remained available to him for approximately a month before the post office returned it to the TBI. The Defendant also testified that since being arrested for noncompliance with the registry, he had been in full compliance with the registry program for a period of approximately ten months.

Charles R. McBryar, the Defendant's brother, testified on the Defendant's behalf. He stated that the Defendant lived with their mother on Adkins Road. He also verified that the Defendant sometimes worked out of town as a construction worker.

Lily Martin, the Defendant's mother, verified that the Defendant lived with her and that he did not leave her home for more than ten consecutive days during the time period at issue. With regard to the TBI forms sent to the Defendant, she maintained that she and her son "never knew when [the forms] were coming." She testified that the Defendant always filled out the forms if he was present at her home when the forms arrived. She also reported that she accepted the forms on her son's behalf when the Defendant was in town but not present at their home at the time the forms arrived. However, she stated that when the Defendant was out of town, she did not accept any forms because she believed that he would not be back in time to fill them out. She also testified that the post office sometimes left a "final notice" in her mailbox, although she claimed that she never received any notifications prior to such notices. On these occasions, she claimed she went to the post office to retrieve the forms, but was told that the forms had already been returned to the TBI.

I. SUFFICIENCY OF THE EVIDENCE

The Defendant first argues that the evidence is insufficient to support his conviction for violation of the Sexual Offender Registration and Monitoring Act. Specifically, he contends that the State failed to show that he was properly advised of the requirements of the Sexual Offender Registry Program and of the sanctions for failing to report.

When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990), overruled on other grounds, State v. Hooper, 29 S.W.3d 1 (Tenn. 2000).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956); State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.

The statute governing the offense in this case provides, in pertinent part, as follows:

> Knowing falsification of a sexual offender registration/monitoring form or verification/monitoring form constitutes a Class A misdemeanor for the first offense, punishable by confinement in the county jail for not less than one hundred eighty (180) days. . . . Knowing failure to timely disclose information or photographs or to timely deliver required registration/monitoring or verification/monitoring forms to the TBI shall be deemed to be falsification to the same extent as actually providing false information.

Tenn. Code Ann. § 40-39-108(a).

Having reviewed the evidence presented at trial, we conclude that ample evidence was presented from which the jury could have adduced the Defendant's guilt. More specifically, we conclude that evidence was presented from which the jury could have determined that the Defendant knew and understood the requirements and sanctions for violation of the Sexual Offender Registry Program. The State presented testimony by a counselor at the facility where the Defendant was incarcerated, Mark Fann, who maintained that he informed the Defendant of the requirements of the reporting program and of the sanctions for failure to report. Fann also testified that the Defendant appeared to understand the requirements of the program. In addition, the State entered into evidence a "Status Offender Release Notification" form which stated the basic requirements of the program and bore the Defendant's signature. The Defendant himself admitted to signing the form prior to his release from incarceration. The Defendant further admitted that he fully complied with the reporting program for approximately a year before defaulting. These facts all support the jury's conclusion that the Defendant knowingly violated the requirements of the Sexual Offender Registry Program. The jury apparently discredited the Defendant's claim that he was prevented from complying with the program due to short job-related trips. It also apparently discredited the Defendant's claim that he was never informed of the requirements of the program or the sanctions for failing to comply with the requirements. We may not disturb these findings of the jury on appeal.

II. JURY INSTRUCTIONS

In a related issue, the Defendant argues that the trial court erred by failing to instruct the jury that "it could not convict the [D]efendant unless it believed beyond a reasonable doubt that the requirements of the [Sexual Offender Registration and Monitoring Act] were 'fully explained' and that the [Defendant] 'understood' the requirements." Defense counsel requested such an instruction, but the trial court denied the request. We first note that the Defendant failed to file a motion for new trial and therefore has waived consideration of this issue on appeal. See Tenn. R. App. P. 3(e). Nevertheless, we will briefly address the Defendant's argument.

"[A] defendant has a constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). However, when jury instructions are full, fair, and accurate statements of the law, a trial court is not required to provide special instructions. State v. Mann, 959 S.W.2d 503, 521 (Tenn. 1997); State v. Kelley, 683 S.W.2d 1, 6 (Tenn. Crim. App. 1984); State v. Chestnut, 643 S.W.2d 343, 352 (Tenn. Crim. App. 1982)). It is not error for a trial

court to deny a request for special instructions when the court's instructions on a matter are proper. State v. Vann, 976 S.W.2d 93, 114 (Tenn. 1998).

> The trial judge in this case specifically instructed the jury:
> For you to find the defendant guilty of this offense, the State must have proven beyond a reasonable doubt the existence of the following essential elements: One, that the defendant was a convicted sex offender; and two, that he unlawfully falsified a sexual offender registration monitoring form or verification monitoring form; and three, that he acted knowingly.

(Emphasis added.) He further instructed the jury that "[t]he term falsification includes a knowing failure to timely disclose required information or photographs or to timely deliver registration monitoring or verification forms to the Tennessee Bureau of Investigation." In addition, he instructed the jury that "knowing" is defined as follows: "A person acts knowingly or with knowledge if that person acts with an awareness either that, one, his or her conduct is of a particular nature; or two, a particular circumstance exists."

We conclude that this constitutes an accurate and complete charge of the law governing the Defendant's offense. The trial judge was therefore not required to grant the Defendant's request for special instructions. Moreover, according to the instructions provided by the trial court in this case, in order for the jury to find the Defendant guilty of the offense charged, it must have found that he acted knowingly. To have found that the Defendant acted knowingly, the jury implicitly must have found that he knew and understood the requirements and sanctions of the Sexual Offender Registration and Monitoring Act. We therefore conclude that this issue is without merit.

III. SENTENCING

The Defendant next argues that the trial court erred by concluding that a sentence for violation of the Sexual Offender Registration and Monitoring Act cannot be suspended.[1] The Defendant argues that Tennessee Code Annotated § 40-39-108(a), the statute governing penalties for his offense, does not specify that a sentence pursuant to its terms may not be suspended. He insists that if the legislature intended to exclude suspension of a sentence in enacting Tennessee Code Annotated § 40-39-108, "then the statute is so vague to the point that no reasonable person may understand its meaning."

The State counters that the language of Tennessee Code Annotated is most closely analogous to that of Tennessee Code Annotated § 55-10-403, which governs the penalties for driving under the influence (DUI). The State correctly asserts that Tennessee Code Annotated § 55-10-403 has been construed as requiring a minimum mandatory sentence for DUI offenses to be served in confinement.

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[1] We note that although the record in this case indicates that the trial court did not suspend the Defendant's sentence, it is unclear whether the trial court determined that a sentence pursuant to Tennessee Code Annotated § 40-39-108(a) may never be suspended. However, the trial court's decision in this regard does not affect our analysis of this issue.

See State v. Palmer, 902 S.W.2d 391, 394 (Tenn. 1995) (stating that a trial court may not designate a specific percentage in a DUI case where the sentence would operate to reduce the mandatory minimum sentencing provision). The State thus urges us to construe Tennessee Code Annotated § 40-39-108(a) in the same manner as courts have construed Tennessee Code Annotated § 55-10-403.

Generally, the language of a penal statute must be clear and concise to give adequate warning so that individuals might avoid the prohibited conduct. See State v. Boyd, 925 S.W.2d 237, 242-43 (Tenn. Crim. App. 1995). An enactment whose prohibitions are not clearly defined is void for vagueness. See State v. Lakatos, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994). As previously stated, the statute at issue in this case provides, in pertinent part, that the "[k]nowing failure to timely disclose required information . . . or to timely deliver required registration/monitoring or verification/monitoring forms to the TBI," first offense, is "punishable by confinement in the county jail for not less than one hundred eighty (180) days." Tenn. Code Ann. § 40-39-108(a).

Contrary to the Defendant's assertions, we believe that the language of Tennessee Code Annotated § 40-39-108(a) is clear and concise. The statute states that a violation of the Sexual Offender Registration and Monitoring Act is "punishable by confinement in the county jail for not less than one hundred eighty (180) days." Id. § 40-39-108(a) (emphasis added). Because the statute mandates confinement, we conclude that a sentence pursuant to Tennessee Code Annotated § 40-39-108(a) may not be suspended. Nevertheless, we do not conclude that a defendant sentenced under Tennessee Code Annotated § 40-39-108(a) must serve one hundred eighty days "day for day." Unlike Tennessee Code Annotated § 55-10-403, the statute at issue here contains no provision mandating service of "at least the minimum sentence day for day." Id. § 55-10-403(a)(1). We therefore conclude that the trial judge in this case did not err by determining not to suspend the Defendant's sentence.

IV. RIGHT TO CONFRONTATION

Finally, the Defendant challenges the constitutionality of Tennessee Code Annotated § 40-39-108(b), which allows for the introduction of a sworn affidavit from a TBI records custodian, "in lieu of live testimony," to establish that a sexual offender has violated the registration or verification requirements of the Sexual Offender Registration and Monitoring Act. The Defendant contends that this provision violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. He further contends that his confrontation rights were violated because of the State's reliance on this provision at trial.

As we have previously noted, the Defendant failed to file a motion for new trial. This issue is therefore waived. See Tenn. R. App. P. 3(e). Nevertheless, we believe that consideration of this issue is "necessary to do substantial justice." Tenn. R. Crim. P. 52(b); see also State v. Adkisson, 899 S.W.2d 626, 637-38 (Tenn. Crim. App. 1994). Therefore, in an exercise of our discretion, we will consider the Defendant's contention that Tennessee Code Annotated § 40-39-108(b) violates his constitutional right to confrontation. See Adkisson, 899 S.W.2d at 638 (stating that consideration of an issue pursuant to Rule 52(b) "rests within the sound discretion of the appellate court").

The Confrontation Clause of the United States Constitution guarantees a criminal defendant the right to confront witnesses against him or her. See U.S. Const. amend. VI; Davis v. Alaska, 415 U.S. 308, 315 (1974). This right is also protected by the Tennessee Constitution. See Tenn. Const., art. I, § 9.[2] In State v. Henderson, 554 S.W.2d 117 (Tenn. 1977), the Tennessee Supreme Court reviewed the standards for determining when an out-of-court statement satisfies a defendant's confrontation rights under both the United States and the Tennessee Constitutions. The court stated that at least three criteria must be met in order to satisfy the Confrontation Clause: (1) The evidence to be presented must not be "'crucial'" or "'devastating,'" id. at 119 (citing Dutton v. Evans, 400 U.S. 74, 87 (1972)); (2) "[t]he State must make a good faith effort to secure the presence of the person whose statement is to be offered against the defendant," id. at 119-20; and (3) "[t]he evidence offered under a hearsay exception must bear its own 'indicia of reliability.'" Id. at 120 (citing Dutton, 400 U.S. at 89); see also State v. Armes, 607 S.W.2d 234, 237 (Tenn. 1980). Evidence is deemed "crucial" if it constitutes an essential element of the crime. Id.; State v. Kennedy, 7 S.W.3d 58, 65 (Tenn. Crim. App. 1999).

However, the Henderson test does not apply to statements that fall within a firmly rooted hearsay exception. See State v. Alley, 968 S.W.2d 314, 317-18 (Tenn. Crim. App. 1997). Reliable hearsay which comports with an exception to the hearsay rule does not violate a defendant's confrontation rights. State v. Causby, 706 S.W.2d 628, 631 (Tenn. 1986) (citing Ohio v. Roberts, 448 U.S. 56, 65 (1980)); see also Kennedy, 7 S.W.3d at 65. Such statements are deemed "so inherently trustworthy that adversarial testing would add little to their reliability." Kennedy, 7 S.W.3d at 66.

One such exception to the hearsay rule is the business records exception,[3] set forth in Rule 803(6) of the Tennessee Rules of Evidence:

> A memorandum, report, record, or data compilation in any form of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used on this paragraph includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit.

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[2] Because the Tennessee Constitution requires "face-to-face" confrontation, it affords a defendant greater constitutional protection than does the United States Constitution. See Neil P. Cohen et al., Tennessee Law of Evidence § 802.3 (3d ed. 1995) (citing State v. Deuter, 839 S.W2d 391 (Tenn. 1992)).

[3] "The courts of this state, our sister states, and many federal courts have held that the 'business records' exception to the rule against hearsay is firmly established." State v. Green, No. 03C01-9812-CC-00422, 1999 WL 592229, at *6 (Tenn. Crim. App., Knoxville, Aug. 9, 1999); see also Kennedy, 7 S.W.3d at 67 n.8.

Tenn. R. Evid. 803(6).

The public records exception is another firmly rooted exception, having long been recognized in the law. See Evanston v. Gunn, 99 U.S. 660, 666-67 (1897); White v. United States, 164 U.S. 100, 102-03 (1896); see also 5 Wigmore, Evidence § 1632 (Chadbourn rev. 1974). More recently, the Supreme Court has noted that properly administered, the public records exception would seem to be among the safest of the hearsay exceptions. Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980) (quoting Comment, 30 La. L. Rev. 651, 668 (1970)); see also United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) (stating that the public records hearsay exception is firmly rooted). Tennessee Rule of Evidence 803(8) provides:

> Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel.

Tenn. R. Evid. 803(8). "This rule permits reports of various public agencies to be introduced to prove the truth of the assertions in the report. As long as the information in a report comes from a declarant observing and reporting 'pursuant to a duty imposed by law,' the report is admissible despite being hearsay." Neil P. Cohen et. al., Tennessee Law of Evidence § 803(8).3 (3d ed. 1995).

In the case at bar, the Defendant challenges the introduction through an affidavit "in support of probable cause" by TBI records custodian Kathryn Brewington of records indicating the Defendant's noncompliance with the requirements of the Sexual Offender Registration and Monitoring Act. In her affidavit, Brewington states that she is a TBI records custodian "responsible for the custody and maintenance of all registry records." She also states that her affidavit is submitted in good faith and is based on "information contained in the official sexual offender registration/monitoring records established and maintained by" the TBI. She next states that the Defendant is a registrant in the registry program. Finally, she states that the Defendant failed to comply with the requirements of the program ten times. She then outlines the exhibits attached to the affidavit, comprised of copies of the Defendant's verification forms, return receipts, and certified mail envelopes.

Because the evidence in this case was not introduced by a witness, it cannot fall within the business records exception to the hearsay rule. Rule 803(6) expressly requires introduction of business records "by the testimony of the [records] custodian or other qualified witness." Tenn. R. Evid. 803(6). However, unlike the business records exception, the public records exception does not require introduction of records through a custodian or other qualified witness. State v. Richard Korsakov, No. E1999-01530-CCA-R3-CD, 2000 WL 968812, at *8 (Tenn. Crim. App., Knoxville, July 13, 2000) (for publication); see Tenn. R. Evid. 803(8).

We conclude that the records at issue in this case fall within the public records exception to the hearsay rule. The TBI is required by statute to "establish, maintain, and update a centralized

record system of sexual offender registration and verification information." Tenn. Code Ann. § 40-39-106(a). Certain information concerning each registered sexual offender is public, including "[t]he date of the last verification of information by the offender." Id. § 40-39-107(f)(6).[4] Because the records at issue in this case are regularly kept "pursuant to a duty to report" and because they emanate from the TBI, they do not "indicate lack of trustworthiness." Tenn. R. Evid. 803(8).

We note that the records introduced in this case contained forms signed and returned by the Defendant as well as the blank unsigned forms returned to the TBI by the post office. The records introduced also contained copies of certified mail envelopes stamped "Return to Sender" and marked "Unclaimed." These statements are hearsay and are not admissible under any exception to the hearsay rule of exclusion. However, their admission did not affect the result of the trial given the fact that the gravamen of the offense is the failure to file the completed forms, a failure that was shown through admissible evidence and acknowledged by the Defendant.

We note that the public records exception expressly excludes "matters observed by police officers and other law enforcement personnel." However, we do not believe that this exclusion applies to the records in the case at bar. The exclusion typically applies to police reports, which are excluded because information contained in police reports "is hearsay and is a mere opinion or conclusion not based on personal observation" and because "if the report contains an opinion or conclusion relating to the cause of or responsibility for an accident or injury, such evidence invades the province of the jury as to the very matters to be determined." McBee v. Williams, 405 S.W.2d 668, 671 (Tenn. Ct. App. 1966). The records in this case are routinely kept records which do not contain opinion or conclusion not based on personal observation. Thus, the dangers that the exclusion seeks to protect against are not at issue in this case.

Furthermore, Rule 901(b)(7) of the Tennessee Rules of Evidence provides that a writing may be authenticated as a public record if: (1) the writing is recorded or filed in a public office; (2) the recording or filing of the writing is authorized by law; and (3) the writing is shown to be from the office where records of its nature are kept. Tenn. R. Evid. 901(b)(7); Neil P. Cohen et. al., Tennessee Law of Evidence § 901.8 (3d ed. 1995). Rule 902(4) of the Tennessee Rules of Evidence states that "[a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office (including data compilations in any form), certified as correct by the custodian or other person authorized to make the certification, by certificate complying with . . . any Act of . . . the Tennessee Legislature . . . ." is self-authenticating. Tenn. R. Evid. 902(4).

The records in this case were recorded and filed in a centralized record system by the TBI maintained pursuant to statute. See Tenn. Code Ann. § 40-39-106(a). In her sworn affidavit accompanying the records, pursuant to Tennessee Code Annotated § 40-39-108(b), Kathryn

[4] We acknowledge, however, that "this exception does not reach only records open to the public. The term 'public' refers to the source of the record, not its audience." Neil P. Cohen et. al., Tennessee Law of Evidence § 803(8).1 (3d ed. 1995).

Brewington states that she is a TBI records custodian responsible for maintaining the records, that her affidavit is submitted in good faith and is based on information from TBI records, and that the Defendant failed to comply with the requirements of the Sexual Offender Registration and Monitoring Act ten times. Therefore, the records introduced in this case were self-authenticating, and no extrinsic evidence was required to authentic them.

We note that the affidavit states that the Defendant "has failed to timely disclose required information and/or timely cause to be delivered the required registration/monitoring forms to the Tennessee Bureau of Investigation in violation of said Act (TCA 40-39-108) ten times." The statute provides that the records custodian "may, by sworn affidavit, verify that according to such records" the Defendant is in violation of the registration or verification requirements. Tenn. Code Ann. § 40-39-108(b) (emphasis added). In this respect, stating that the records do not contain completed, signed verification forms has been considered nonhearsay. See Tenn. R. Evid. 803(10) (reserved), Advisory Commission Comments (stating that "absence of an entry in a public record is not a hearsay statement"); see also Tenn. Code Ann. § 24-6-107 (stating that the "certificate of a public officer that he has made diligent and ineffectual search for a paper in his home or office is of the same efficacy in all cases as if such officer had personally appeared and sworn to such facts"); cf. United States v. Spine, 945 F.2d 143, 148 (6th Cir. 1991) (stating that the absence of an entry in a public record is admissible under Fed. R. Evid. 803(10)). In this case, though, the affiant omitted that the records were the basis for the verification and, instead, affirmatively stated that the Defendant had violated the act. Technically, this statement is hearsay, although, again, its admission was totally harmless in the context of the remaining evidence.

For the foregoing reasons, we conclude that the public records exception to the hearsay rule applies to the records in this case. Therefore, admission of the Defendant's records at trial pursuant to Tennessee Code Annotated § 40-39-108(b), through the sworn affidavit of a TBI records custodian, did not violate the Defendant's constitutional right to confrontation.

Accordingly, we AFFIRM the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE